

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.- NORTH

JUNE TERM, 2007

STATE OF NEW HAMPSHIRE

V.

MICHAEL ADDISON

No. 07-S-0254

Motion to Bar The Death Penalty (No. 3): "Procedure in Capital Murder" Statute Violates Separation of Powers

Michael Addison moves to bar the imposition of the death penalty.

The doctrine of separation of powers prevents the legislative branch of government from telling the judicial branch how to perform its essential functions. RSA 630:5, III, the statutory provision that dictates capital sentencing procedure, violates the doctrine of separation of powers because it manifests the legislature's effort to strip from the judiciary its inherent authority to control proceedings uniquely within the realm of the judiciary, specifically, jury trials and sentencing hearings. Accordingly, the statute is unconstitutional. N.H. Const. pt. I, art. 37; pt. II, art. 73-a.

As a result, the State may not seek death as a punishment in this case.

As grounds, Mr. Addison states:

1. He is charged with capital murder. The indictment alleges that Mr. Addison knowingly caused the death of Manchester Police Officer Michael Briggs while Officer Briggs was acting in the line of duty. RSA 630:1, I(a). The State has filed a notice of its intent to seek the death penalty. RSA 630:5, I.

2. Under New Hampshire law, if the State proves the accused guilty of capital murder, the same jury that heard the trial must address the issue of sentencing. RSA 630:5, II. In RSA 630:5, III & IV, the legislature dictates the procedures that govern the sentencing proceeding before the jury.

3. In addition to mandating that the accused submit the issue of his sentencing to the jury rather than the judge who presided over his trial,¹ the legislature has dictated that no presentence investigation report shall be prepared. Cf. RSA 651:4, I (“No person convicted of a felony shall be sentenced before a written report of a presentence investigation has been presented to and considered by the court, unless waived by the defendant or the state, or by the court.”). It has also dictated, with precision, how the sentencing trial shall occur, what rules shall and shall not apply, the order in which the jury shall consider the aggravating and mitigating factors, and the manner in which the jury shall weigh those factors. RSA 630:5, III & IV. The legislature’s use of the word “shall” affords the court no discretion in these matters. In re Christopher K., No. 2005-532, slip op. at 7 (N.H. April 17, 2007)(“The general rule of statutory construction is that the word shall’ is a command which requires mandatory enforcement.”)(quotation omitted).

4. On information and belief, the legislature imported these provisions directly from the federal death penalty statute. It did so, however, without apparent regard for the potential that abrogating judicial discretion in these matters would implicate separation of powers concerns under the state constitution². Indeed nowhere in the legislative history underlying the death penalty statutes is it apparent that the legislature employed individuals familiar with the

¹Mr. Addison intends to challenge the statute on this basis in a separate motion.

²Mr. Addison raised a similar concern in his second motion to bar the death penalty, with regard to burden of proof issues unique to the state constitution.

additional safeguards afforded by the New Hampshire Constitution, for the purpose of attempting to discern the degree to which the federal statute failed to satisfy the more expansive state constitution.

5. Mr. Addison does not challenge the legislature's ability to fix the range of possible penalties for capital murder, nor does he challenge its ability to set forth statutory aggravating and mitigating factors.³ In this pleading, he does not challenge the legislature's ability to establish burdens of proof, nor set the parameters for the circumstances under which the jury may, or may not, impose a death sentence. He does challenge the legislature's ability to remove, from the domain of the judiciary, the discretion to govern the mechanics of the sentencing proceeding before the jury, because this legislative action violates separation of powers.

6. While the doctrine of separation of powers is implicit in the federal constitution, the New Hampshire Constitution contains a separation of powers clause. "In the government of this state, the three essential powers thereof, to wit, the legislative, executive and judicial, ought to be kept separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." N.H. Const. pt. I, art. 37.

7. Separation of powers concerns are more acute here in other regards as well. In the federal system, Congress retains ultimate authority over the federal rules of evidence and procedure, the penal laws, and sentencing.⁴ Thus, it regulates all of the essential rules governing

³In separate pleadings, however, Mr. Addison intends to facially challenge the aggravating and mitigating factors.

⁴Under the federal system, the Supreme Court proposes rules of procedure, but ultimately they must be approved by Congress. See generally, 28 U.S.C. §2071-77. See also, Dickerson v. United States, 530 U.S. 428, 437 (2000)(Congress may establish, or set aside, rules of evidence).

the conduct of trials. In New Hampshire, however, it is the Supreme Court that promulgates, and approves, the rules of court and evidence. N.H. R. Ev. 100 (Supreme Court adopts rules of evidence). The rules here thus have force and effect without the legislature's blessing. Based on these critical differences in how rulemaking occurs, any effort by the New Hampshire legislature to regulate court procedure must be carefully scrutinized under the New Hampshire Constitution.

8. "The separation of powers among the legislative, executive and judicial branches of the government is an important part of its constitutional fabric." Duquette v. Warden, No. 2006-079, slip op. at 9 (N.H. January 19, 2007). "The separation of powers doctrine complements the notion of checks and balances by institutionalizing a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another." Opinion of the Justices (Prior Sexual Assault Evidence), 141 N.H. 562, 568 (1997)("O.J."). "The [separation of powers] doctrine is . . . violated when one branch usurps an essential power of another." Petition of Mone, 143 N.H. 128, 134 (1998).

9. "[The Supreme Court] has consistently recognized that as a separate and coequal branch of government, the judiciary is constitutionally authorized to promulgate its own rules." Id. at 569 (quotation omitted); see N.H. Const. pt. I, art. 73-a ("The chief justice of the supreme court shall . . . with the concurrence of a majority of the supreme court justices, make rules governing the administration of all courts in the state and the practice and procedure to be followed in such courts. The rules so promulgated shall have the force and effect of law.").

10. The Court thus found a violation of separation of powers where the legislature attempted to remove the administration of court security from the control of the courts, because

“[t]he power of the judiciary to control its own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court is a power absolutely necessary for a court to function effectively and do its job of administering justice.” Id. at 135 (quoting State v. LaFrance, 124 N.H. 171, 179 (1983)(holding separation of powers violated where legislature attempted to dictate who could wear firearms in court)).

11. It also found a violation where the legislature attempted to radically alter Rule of Evidence 404(b) in sexual assault prosecutions. O.J., 141 N.H. at 578.

12. In O.J., the legislature sought to propose a bill creating a “rebuttable presumption” that evidence of other sexual assaults perpetrated by the defendant would be admissible to show motive, intent, the context of the relationship, or the relationship of the parties. Id. at 566. The legislature sought the Court’s opinion as to whether the bill would violate separation of powers. Id. at 568. The Court held that it would.

13. The decision depended in large part on the determination of whether the proposal governed substance or procedure. Id. at 570. The Court ruled that substantive law “relates to rights and duties,” while procedural law “refers to the means and methods by which those rights and duties are to be protected and enforced through the courts. . . .” Id. at 572 (quotation omitted). The legislature may, consistent with separation of powers, affect the former, but its ability to control the latter is circumscribed. Id. at 571.

14. Applying this test, and separation of powers principles, the Court held that the legislature could not effectively abrogate Rule 404(b). “Rule 404(b) is simply a procedural means by which the fair trial right is secured. Giving deference to the legislature would, in this instance, abolish the rule’s purpose and interfere with the judiciary’s sound discretion in

determining to what extent the rule serves its function in the circumstances of a particular case.”

Id. at 574; see also, id. at 576 (“The proposed legislation would restrict the trial court’s exercise of discretion in making an initial determination that the offered evidence is relevant.”).

When this occurs, “[a] court’s constitutional function to independently decide controversies is impaired. . . .” Id. at 577. “The legislature has no more right to break down the rules prescribed by this court to assure fundamental due process in civil and criminal trials than the court has to prescribe the mode and manner in which the legislature shall perform its legislative duties.” Id. at 578.

15. If a defendant is convicted of capital murder, the statute directs that the trial judge preside over a separate jury trial on the issue of sentencing. Presiding over jury trials, and determining how sentencing hearings should proceed, are essential judicial functions. State v. Fecteau, 140 N.H. 498, 504 (1995)(“The trial court has inherent power to control every aspect of the proceeding before it.”)(citing LaFrance, 124 N.H. at 180); Duquette, slip op. at 10 (“[S]entencing is an exclusively judicial function.”)(quoting Bussiere v. Cunningham, 132 N.H. 747, 755 (1990)). The legislature may fix parameters governing those functions, but it may not usurp them.

16. In several respects, RSA 630:5, III unconstitutionally encroaches upon these essential judicial functions by purporting to regulate matters of procedure. The legislature has determined that the jury may consider “information . . . as to matters relating to any of the aggravating or mitigating factors. . . .” RSA 630:5, III (emphasis added). Under this standard, “information” is not limited to live testimony, nor is it necessarily constrained by any requirement of intrinsic reliability. In addition, the “information” need not necessarily be, in the strict sense, logically

relevant, since that concept derives from the rules of evidence which the legislature has abrogated. RSA 630:5, III (deeming information admissible “regardless of its admissibility under the rules of evidence. . .”).

17. By eliminating the rules of evidence, the “information” additionally need not comply with Rules 404, 405, 406, or 410. It apparently may violate a privilege recognized by the 500 series of the rules. It appears as if it may be delivered by a witness that is incompetent or lacks personal knowledge. It may be admitted without regard to Rules 608-610. It may constitute an opinion otherwise inadmissible under Rules 701-705. It may be hearsay that fits no exception to the hearsay rule. It may not be properly authenticated.

18. In any other criminal jury trial, the Court would have the authority to ensure the reliability of the jury’s determination by rigorously controlling the “information” that comes before it. Under this statute, the only potential control of the flow of “information” is a truncated version of Rule 403. Compare RSA 630:5, III (“information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury”) with N.H. R. Ev. 403 (includes those grounds, but also “considerations of undue delay, waste of time, or needless presentation of cumulative evidence”). Under these circumstances, not only has the legislature impaired the Court’s ability to perform its essential function in a jury trial, but it has done so in a manner that creates the substantial risk of a verdict based on less-than-reliable, or even incompetent, evidence.

19. For these reasons, the core provisions of RSA 630:5, III, which define the “information” the sentencing jury may consider, and eliminate the rules of evidence, violate the doctrine of separation of powers. Accordingly, the statute is unconstitutional. The State cannot


seek the death penalty in this case.

WHEREFORE, Mr. Addison respectfully requests that this Honorable Court:

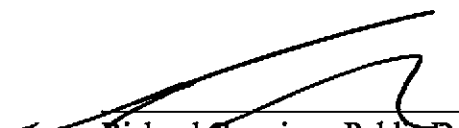
a. Rule that RSA 630:5, III violates separation of powers, because the legislature cannot eliminate the rules of evidence from a capital sentencing proceeding and bar the death penalty; or, in the alternative,

b. Certify the issue raised in this motion to the Supreme Court for its interlocutory review.


Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been forwarded this 22nd day of June, 2007, to the Office of the Attorney General.



David Rothstein, Public Defender

HILLSBOROUGH COUNTY

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